IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

J. I. CASE COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD.

CLARK M. ROBERTSON,
JOHN C. GALL,
BEN T. REDD,
HOWARD B. JOHNSON,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INTRODUCTORY STATEMENT.

The Petition for Writ of Certiorari filed by Petitioner sets forth the opinions below, the jurisdiction of this Court, and the questions presented here. The purpose of this Reply Brief is to correct certain statements appearing in the Brief of the National Labor Relations Board and to answer certain of the arguments therein. For the sake of convenience, matters discussed in this Reply Brief will be presented in the order in which they appear in the Brief of the National Labor Relations Board.

QUESTIONS PRESENTED.

1. Question 1, as stated by the Board on page 2 of its Brief, does not correctly state the issue.

The issue presented by the Union and the issue on which the charge of an unfair labor practice was based was not a question of changing by collective bargaining any of the terms and provisions of an existing agreement but was predicated upon the Union's position that the individual contracts were of no effect, and its demand upon the Petitioner to disregard entirely the rights and responsibilities of such contracts. (R. 52.) Thus the issue, as stated by Petitioner in its petition, is whether individual contracts are superseded by the selection of a collective bargaining representative. The question as stated by the Board is entirely academic in this proceeding and was first advanced after the charge had been filed and the complaint issued. Petitioner does not challenge the correctness of the proposition that individual contracts can be changed by collective action. It so stated in its Brief filed with the Board and quoted the same statement in its Brief before the Circuit Court of Appeals (p. 15) as follows:

> "In the absence of specific delegation of authority looking toward the revision of the now existing contracts, these contracts cannot be changed by collective action. That is to say, the collective representative could negotiate changes in the individual contracts for the individuals it actually represented."

In other words, Petitioner's position was and is that collective bargaining representatives may bargain with respect to changes in valid existing individual agreements provided the collective bargaining representatives have been so authorized by the individuals who are parties to those contracts. Mere selection of a collective bargaining agency by a majority of the employees in the unit does not, however, *ipso facto*, authorize such collective bargaining agency to bargain away rights of individual employees

without specific authorization from the latter. That the collective bargaining agency chosen by a majority of the employees in the present instance had not been specifically authorized to bargain with respect to at least some of the individual contracts, is evident from the fact that it is a mathematical impossibility for all of the holders of the individual contracts to have voted for the bargaining agency in the National Labor Relations Board election. In fact, it is evident that many of the holders of such contracts voted against the bargaining agency so chosen by the other employees (R. 31, 51). The Petitioner's position is in accordance with familiar principles of the law of Contracts and the law of Agency, which have not been superseded by the National Labor Relations Act.

2. The second question stated by the Board on page 2 of its Brief states a conclusion rather than a question. The question, as stated by Petitioner in its Petition, is whether the assertion by Petitioner of the validity and continuing effect of the individual contracts was a utilization of such contracts in interference with the rights of employees guaranteed under the Act.

Of course, if we assume, as the Board does in the statement of the question, that the individual contracts were utilized to interfere with the rights of employees, the question presented by the Board would be answered by its mere statement.

The question stated by the Board is, furthermore, incomplete in that the Order of the Board did not merely require the employer to cease and desist from giving effect to existing valid contracts of employment, but precluded the employer from making any new individual contracts of employment under any circumstances in future. Even if the Board had properly found that existing contracts had been utilized for the purpose of interfering with the right of employees, Petitioner denies that this would have authorized the Board to issue a permanent injunction against making any future valid contracts, thus imposing a penalty

not only upon the Petitioner but upon present and future employees of Petitioner.

3. In the opinion of Petitioner the questions presented for the determination of this Court are correctly stated at pages 2 and 3 of its Petition for Writ of Certiorari.

STATEMENT.

In the last paragraph on page 3 of the Board's Brief and concluding at the top of page 4, reference is made by the Board to Petitioner's letter to its employees dated December 17, 1941, and the Board states:

> "The letter set forth the Company's assertion at the hearing that the individual agreements were a bar to the designation of a union as the exclusive bargaining representative of the employees."

Petitioner's letter to which reference is made actually stated as follows (R. 47):

> "The Company asks that the petition be denied in view of the fact that the union did not represent a majority, or even a substantial number of the Case employees involved, and furthermore showed to the Board that on the payroll of November 22, 1941, 433 of the employees had exercised their right to make individual contracts with the Company."

On page 4 of its Brief the Board states that the Petitioner refused to bargain collectively with the Union as the exclusive representative of the employees in the bargaining unit.

The position of Petitioner in this respect is set forth on page 52 of the Record. At no time has Petitioner challenged the exclusive representation by the Union for purposes of collective bargaining, or refused to deal with the Union as the exclusive collective bargaining representative pursuant to the Board's certification.

Petitioner's insistence with respect to the validity and continuing effect of its contractual relationship, cannot be

construed as a refusal to bargain in the face of the Union's insistence that this relationship was abrogated and must be disregarded.

ARGUMENT.

1. The Board in its Brief states that Petitioner has taken the position that it "automatically exempted itself, for the duration of such agreements, from its duty to bargain collectively with respect to matters covered therein". (Board's Brief, page 6). As shown above, (R. 52) the Company took no such position and its position in this respect is stated on page 2 of this Reply Brief.

2. The Board in its Brief, pages 6 and 7, has undertaken to define the duty to bargain collectively as imposed by the National Labor Relations Act. It interprets the legislative findings set forth in Section I of the Act as meaning that because of a gross inequality of bargaining power, it is *necessary* for employees to act in concert in order to obtain fair terms of employment. Accordingly, the Board concludes that the Congress intended that the selection of a collective bargaining agent superseded any rights of individual contract which might theretofore have existed on the part of any of the employees in the unit.

In support of this interpretation the Board cites the legislative findings in the Norris-LaGuardia Act.

Petitioner believes that there is no warrant in the terms of the National Labor Relations Act, Section I, for the conclusion that Congress intended to abrogate the right of individual contract of to supersede such rights upon the selection of a collective bargaining agent. On the contrary, this Court, in the *Jones & Laughlin* Case (301 U. S. 1), emphasized that there was no conflict between the exercise of individual right of contract and the right of collective bargaining under the Act. The Board's interpretation of Section I of the Act and of this Court's decision in the *Jones & Laughlin* Case, emphasizes the importance of this issue and the necessity for this Court to interpret the statute and its own decision.

Furthermore, the Board, in relying upon the legislative findings in the Norris-LaGuardia Act, apparently ignores the fact that that Act specifically recognizes not only the *right of association* but the *right of non-association*, in express words.[1] If this declaration on the part of Congress means anything, it must mean that the Congress was as much concerned with the preservation of individual rights as the guarantee of collective rights. It is to be noted, also, that by the terms of the National Labor Relations Act, (Section 1) the provisions of the Norris-LaGuardia Act (including this declaration of policy), are fully preserved.

There is no provision in the Norris-LaGuardia Act, the National Labor Relations Act, or, it is believed, in any of the decisions of this Court, which warrant the Board in its conclusion that it is "*necessary*" for employees to act in concert. The public policy expressed in those statutes and sustained in the decisions of this Court, is only that where employees desire to bargain collectively they should be protected in the exercise of their right to do so. Neither is there in these statutes or in the decisions of this Court any basis for the Board's conclusion that the National Labor Relations Act intended to "*supplant*" individual rights by the mere exercise of collective rights by a majority of the employees in the unit. This, in essence, is the very doctrine repudiated by this Court in the *Jones & Laughlin* Case.

3. On pages 9 and 10 of its Brief, the Board discusses the provision of the Order perpetually enjoining Petitioner from entering into individual contracts with its employees, and concedes that the Order is broad enough to support this construction. The Board, however, states that it was not so intended and that Petitioner is not prevented from lawfully contracting with employees individually under circumstances which negative any attempt to interfere with their rights. The Board states that its position in this respect was included in its Brief before the Circuit Court of

[1] Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. 102.

Appeals. Petitioner stated in its Brief before the Circuit Court of Appeals as follows (page 6):

> "Respondent asserts and has asserted its right to enter into individual contracts of employment with employees desiring to make such contracts, where such contracts are not a condition of employment and are freely and voluntarily entered into by the employees and do not contain provisions repugnant to the National Labor Relations Act, and are not entered into for the purpose of interfering with, restraining, or coercing its employees in the exercise of their rights under the Act."

If the Board concurred, as it now states, its concurrence in this statement was so obscure that it was not detected either by the Petitioner or by the Circuit Court of Appeals.

4. On page 11 of the Board's Brief the proposition is advanced that there is no occasion at the present time for a review of the Board's order requiring the cancellation of the contracts since the contracts expired July 31, 1942, and although this does not render the issue "moot", it renders it of no "present practical importance." This is, indeed, a most interesting statement. The situation in this respect is no different now than it was at the time the case was presented to the Circuit Court of Appeals. Petitioner in its Brief to the Circuit Court of Appeals pointed out exactly the same circumstances now presented by the Board and made the point which the Board now makes. Counsel for the Board replied most vigorously in the oral argument to the effect that the public interest was involved and hence the issue could not be moot and must be determined, citing *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. It seems most unusual for the Board, in the face of having had the issue decided in its favor, to now resist a review of the Board's Order on the ground it so vigorously protested before the Circuit Court of Appeals.

Furthermore, the Board, in now arguing that this Court should not grant certiorari because the questions presented

are of no present practical importance, entirely ignores the fact that this Petitioner was not only required by the Board's Order to cease asserting any rights under then existing individual contracts, but was permanently enjoined from entering into similar contracts in the future. It can hardly be urged that a permanent injunction of this nature is of no practical importance to Petitioner or to present or future employees who may wish to exercise rights which they believe they have under the law and decisions of this Court and which now appear to be conceded by the Board.

The Board, on page 12 of its Brief, also interprets its Order as merely preventing "extension or renewal or remaking" of the particular individual contracts which were in existence when the collective bargaining agent was certified. However, the Board's Order is much broader than its interpretation of its Order in that the Order would likewise preclude the making of new agreements with other employees in the future under the circumstances described in the Board's Order.

CONCLUSION.

Petitioner submits that the decision below is erroneous; that it presents a conflict of decisions; and that the necessity for the granting of the Petition for Certiorari is emphasized by the Brief filed herein by the National Labor Relations Board. The Board on page 10 of its Brief, admits that its Order was "broadly phrased" but insists that it did not intend the Order to be broadly construed. This admission on the part of the Board, even apart from the other important considerations urged by Petitioner, supports the granting of the Writ.

Respectfully submitted,

CLARK M. ROBERTSON,
JOHN C. GALL,
BEN T. REIDY,
HOWARD R. JOHNSON,
Counsel for Petitioner.